STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

JOHNNY RAY KENNEDY **No. 154445**
Defendant-Appellant.

L.C. No. 14-001748-FC
COA No. 323741

SUPPLEMENTAL BRIEF ON APPLICATION FOR LEAVE TO APPEAL BY DIRECTION OF THE COURT'S ORDER OF 4-27-2017

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Table of Contents

Table of Authorities

Other Authority

Counterstatement of the Question

I.

Defendant has no constitutional or statutory right to the appointment of a litigation expert in an area involved in the trial at issue as co-counsel to assist his counsel; indeed, appointment of a co-counsel is not permitted by statute. Defense counsel requested the appointment of an attorney with expertise in "DNA litigation" to assist him. Did the trial judge his discretion in denying this improper request, and was defense counsel ineffective in not requesting the appointment of a forensic scientist for the defense?

Defendant answers: YES

The People answer: NO

Counter-Statement of Facts

Facts are stated as required in the argument.

Argument

I.

Defendant has no constitutional or statutory right to the appointment of a litigation expert in an area involved in the trial at issue as co-counsel to assist his counsel; indeed, appointment of a co-counsel is not permitted by statute. Defense counsel requested the appointment of an attorney with expertise in "DNA litigation" to assist him. The trial judge did not abuse his discretion in denying this improper request, nor was defense counsel ineffective in not requesting the appointment of a forensic scientist for the defense.

Introduction

This Court has directed that the parties file supplemental briefs as to

> whether the trial court abused its discretion under MCL 775.15 and/or violated the defendant's constitutional right to present a defense when it denied his request to appoint a DNA expert. See *People v Tanner*, 469 Mich 437 (2003); *Ake v Oklahoma*, 470 US 68, 74 (1985) ("We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one."); *Moore v State*, 390 Md 343, 364 (2005) ("The majority of courts have concluded that *Ake* extends beyond psychiatric experts.").[1]

The People answer that defendant did not request the appointment of an expert, but the appointment of co-counsel. There is neither a statutory nor constitutional right to the appointment of co-counsel, and counsel's performance with regard to the DNA evidence presented was easily within the range of competent counsel. Defendant cannot overcome the strong presumption that counsel performed competently; that is, cannot show that counsel "made

[1] *People v. Kennedy*, 893 N.W.2d 337 (2017).

errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[2]

Discussion

A. The trial court did not deny a request by defense counsel for the appointment of a "DNA expert," no such request having been made; rather, the trial judge properly denied the request for appointment of a so-called "DNA litigation expert" as co-counsel

1. The record shows that no request for appointment of a "DNA expert" was made

Though correctly affirming defendant's conviction, the majority opinion of the Court of Appeals acted on a mistaken premise, as did the dissenting opinion, as well as defendant, and also the order for supplemental briefing by this Court. The Court of Appeals majority said that "Before trial, the defense moved for the appointment of a DNA expert to 'aid the defense" because 'this is a case of scientific and complex nature,' and defense counsel wanted to 'consult with [the expert] in his expertise analysis' given the fact that counsel was 'going to get a lot of scientific evidence here [.]' The defense did not anticipate calling the expert to testify at trial and, instead, only intended to consult the expert and utilize the expert's knowledge in order to prepare for cross-examination of the prosecution's witnesses."[3] The dissenting opinion said that "defendant was denied his constitutional right to present a defense by the trial court's denial of his motion to appoint a DNA expert."[4] Defense counsel made a brief argument on appeal

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[2] *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

[3] *People v. Kennedy*, No. 323741, 2016 WL 4008364, at 5 (2016).

[4] *Id*., at 12.

claiming that "Defendant's counsel requested the appointment of a DNA expert."[5] And this Court has said that the trial judge "denied [counsel's] request to appoint a DNA expert." But there was no request for the appointment of a "DNA expert," there was a request for appointment of a particular attorney as co-counsel because of his expertise in *litigation in areas of forensic science* to assist defense counsel in a complex area.

The record demonstrates that the request was for appointment of an attorney experienced in the area of DNA evidence to assist counsel as co-counsel.

> MR. HOLLER: I think the only other contested matter that we have of the motion that I filed I'm requesting that the Court appoint Brian Zubel who has an extensive amount of expertise in DNA to assist me.
>
> ***
>
> MR. HOLLER: My position is this is a case of scientific and complex nature. And Mr. Zubel is recognized as an expert in the field of this matter and going to be at a conference on June 6th and 7th presenting as *a recognized expert in the field [sic: of] litigation in the area of forensic science* and DNA up in Frankenmouth and attached is my motion and see that he tried a great number of cases over many years as a prosecutor and he's also been a lecturer and speaker and authored many articles on this matter.
>
> And in order to preserve the high quality of criminal representation that Wayne County is proud of and we recognized for.
>
> So I am asking that the Court appoint this gentlemen *as an expert to consult*[.] I don't anticipate him testifying but for me to consult with I am going to get a lot of scientific evidence here and *I simply would like to consult with him in his expertise analysis*.

[5] Defendant's Brief, at 24-25. *Ake* was not mentioned in the argument.

> THE COURT: I'm not going to appoint him for that. You can talk to him you can read up on him and go to the conference which all the rest of us have done that that motion is denied.[6]

Though using the term "expert" on occasion, defense counsel was seeking not an expert in DNA but an "expert" in the *litigation* of evidentiary issues concerning DNA evidence, which is to say, an *attorney-specialist* in the area to assist him.[7] His written motion makes that clear, requesting that the court "appoint as an expert in what may be called 'DNA litigation' one Brian Zubel of Fenton, Michigan."[8] Medical and forensic science are frequently involved in the litigation of both criminal and civil cases, and, of course, it is important for attorneys in these cases to understand the science involved. Attorneys may develop a specialization in a particular area; in criminal cases, for example, shaken-baby cases, child-abuse accommodation syndrome cases, spousal-abuse syndrome cases, intoxicated driving, and others; or in civil cases, for special kinds of medical malpractice (some specializing in surgical cases, others in neonatal cases, and so on), or product liability (such as drugs and pharmaceuticals, and others). Indeed, all sorts of areas of practice involve science in the litigation of cases, and it is hardly uncommon for attorneys to specialize in an area, and, in fact, to engage in education of other attorneys in that

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[6] T 5-9, 6-7.

[7] The People argued in the Court of Appeals that "While defense counsel offered little evidence that [attorney] Zubel could have been qualified as an expert in the area of DNA analyzes, he requested his appointment—not for him to perform independent testing of the prosecutor's DNA evidence or to testify on behalf of the defense in rebuttal to the prosecutor's expert—but merely to obtain the assistance of a more experienced attorney to help counsel understand the evidence. Since this request amounted to the appointment of a co-counsel, not an expert witness, and because any benefit was speculative, at best, the trial court did not abuse its discretion by denying the motion." People's Brief on Appeal, at 8.

[8] See Defendant's Motion for Appointment of Brian Zubel, at 2.

area. The attorney who defense counsel wished appointed to assist him holds himself out in this exact way—as a "DNA lawyer," and a "Forensic Science Legal Consultant," saying on his website that "We *partner with leading forensic experts* to investigate and analyze forensic science issues and present winning strategies in court."[9] There is nothing surprising nor remarkable in this; again, a wide variety of attorneys hold themselves out as specialists in a particular area of litigation that involves science in some way, to be hired as counsel, co-counsel, or to be consulted, as defense counsel here put it, for "the *field of litigation* in the area of forensic science." Defense counsel sought the appointment of a co-counsel specialist to assist him, not the appointment of an expert in the sense of *Ake v. Oklahoma*.[10]

2. Defendant was not entitled to the appointment of co-counsel

Though in any case involving forensic science—or indeed also in other areas—an attorney might wish to have the assistance of a co-counsel who is an expert in that area of litigation, a criminal defendant has no right to the appointment of co-counsel. In Michigan, such an appointment is forbidden by statute. MCL § 775.18 provides that "Only 1 attorney in any 1 case shall receive the compensation above contemplated, nor shall he be entitled to this compensation until he files his affidavit in the office of the county clerk, in which such trial or proceedings may be had, that he has not, directly or indirectly, received any compensation for such services from any other source." The trial court could not have appointed co-counsel. With

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[9] http://www.brianzubel.com/index.html (emphasis supplied).

[10] *Ake v. Oklahoma*, 470 U.S. 68, 105 S Ct 1087, 84 L.Ed.2d 53 (1985). The People will return to this point. The expert denied in *Ake* was to be a psychiatrist, and in the very recent case applying *Ake*, *McWilliams v. Dunn*, 137 S.Ct. 1790, 1799 (2017), was also a mental health expert.

the court's permission an attorney might act as co-counsel as a volunteer, but may not be appointed by the court; nothing here suggests other than that defense counsel expected his proposed co-counsel consultant "on the field of litigation of forensic science" to be compensated, which is why appointment was sought. An appearance as a volunteer was neither contemplated nor attempted.

The statute may be overridden if the constitution requires the appointment of co-counsel in some circumstances. It does not. As one federal court has put it, "In some jurisdictions, there is a statutory right to the appointment of two defense attorneys in capital cases. See, e.g., 18 U.S.C. § 3005. However, we are aware of no authority holding that the federal Constitution confers such a right, and we see no basis for such a holding. The Constitution specifies the quality of representation that all criminal defendants, including capital defendants, must receive, namely, 'reasonably effective assistance.'"[11] Defense counsel requested the appointment of an attorney-specialist in forensic science litigation matters to assist him as co-counsel. The trial judge was without statutory authority to do so, and nothing in the constitution overrides the statute. Because defense counsel did not request the appointment of an expert in DNA, the question becomes whether he was ineffective in failing to do so. Defendant can show neither deficient performance nor prejudice; the record of defense counsel's performance at trial belies any such claim.

[11] *Riley v. Taylor*, 277 F.3d 261, 306 (CA 3, 2001). See also *State v. Porter*, 948 P.2d 127, 136–137 (Idaho, 1997).

B. Under the circumstances, the trial court did not abuse its discretion by not appointing a scientist expert for defendant, there being no request for one, and defense counsel was not ineffective in not requesting the appointment of a DNA expert

1. The foundational predicate for appointment of a defense expert was not met here

MCL § 775.15 provides in part that

> If any person accused of any crime . . . shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial . . . and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial, the judge in his discretion may . . . make an order that a subpoena be issued from such court for such witness in his favor . . . and the witness therein named shall be paid for attending such trial, in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people.

This Court has said that under the statute "a trial court is not compelled to provide funds for the appointment of an expert on demand. . . . to obtain appointment of an expert, an indigent defendant must demonstrate a 'nexus between the facts of the case and the need for an expert.' . . . *It is not enough for the defendant to show a mere possibility of assistance from the requested expert.* 'Without an indication that expert testimony *would likely benefit the defense*,' a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness."[12] A trial court's decision whether to grant an indigent defendant's motion for the appointment of a scientific expert is reviewed for an abuse of discretion; "'[a] mere difference in

[12] *People v. Tanner*, 469 Mich. 437, 442–443 (2003) (emphasis supplied).

judicial opinion does not establish an abuse of discretion.'"[13] An abuse of discretion occurs "when the decision results in an outcome falling outside the principled range of outcomes.'"[14]

In *Tanner*, the defendant requested appointment of an expert "to help him better understand the DNA evidence and possibly to testify at trial."[15] DNA analysis had *excluded* the defendant as the source of certain blood evidence, and serology evidence as to one stain established that it could have been left by defendant or one of possibly millions of persons who shared defendant's blood type and PGM subtype.[16] This Court held that under these circumstances, "At best, defendant has raised only the mere possibility that the appointment of a DNA and serology expert might have provided some unidentified assistance to the defense. This falls short of satisfying defendant's burden of showing that she could not safely proceed to trial without such expert assistance. We hold that the trial court did not abuse its discretion in denying defendant's motion."[17]

Similarly, in *People v. Bergman*[18] defendant was convicted of two counts each of second-degree murder, operating a vehicle under the influence of intoxicating liquor or a controlled substance causing death, and operating a vehicle with a suspended license causing death. Though defendant's blood alcohol concentration was below the legal limit, she also tested

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[13] *Id.*, at 442.

[14] *People v. Carnicom*, 272 Mich. App. 614, 616–617 (2006).

[15] *Tanner*, at 441.

[16] *Id.*, at 443.

[17] *Id.*, at 444.

[18] *People v. Bergman*, 313 Mich. App. 471 (2015).

positive for carisoprodol, meprobamate, oxycodone, and amphetamine. A prosecution expert in forensic toxicology testified that combining these drugs could magnify their effects and keep the drugs in the system longer; the expert testified that in her opinion, the drugs in defendant's system affected her ability to operate a motor vehicle.[19] Defendant had moved for the appointment of an expert on toxicology on the grounds that both the accuracy and interpretation of the State Police laboratory tests were critical issues, and she thus needed an expert to examine these points. At a minimum, she said, she needed an expert evaluation of her blood test results on the night of the fatal collision. The trial judge denied the motion, and the Court of Appeals held that though defendant had:

> asserted that toxicology evidence was a critical part of the prosecution's case, . . . *she did not explain why she could not safely proceed to trial without her own expert.* See MCL 775.15. She did not establish why the objective results of blood analysis might be unreliable. She made no offer of proof that an expert could dispute the prosecution experts' opinions regarding the side effects of prescription medications and their contribution to impaired driving. Defendant failed to establish that expert testimony would likely benefit her case. A mere possibility that the expert would have assisted the defendant's case is not sufficient. . . . Accordingly, the trial court did not abuse its discretion by denying defendant's motion.[20]

In *People v. Carnicom* defendant was charged with possession of methamphetamine, and asked for the appointment of an expert regarding the presence of methamphetamine found in his blood by a prosecution expert. He alleged that an expert from a named lab was willing to do independent testing of defendant's blood, as well as to present expert witness testimony at trial.

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[19] *Id.*, at 475-476.

[20] *Id.*, at 489-490.

He claimed that his expert witness would be able to offer testimony that the presence of methamphetamine was caused by defendant's use of prescription Adderall. But beyond this mere assertion, there was nothing that suggested that Adderall could cause a false positive for methamphetamine, and in response to the motion the prosecutor noted that the prosecution expert had confirmed that Adderall does not contain methamphetamine, and at trial an expert testified that according to the Physicians' Desk Reference, methamphetamine is not found in Adderall, and that amphetamine and methamphetamine cannot be mistaken for one another. The Court of Appeals found defendant had not met the threshold for appointment of a scientific expert.[21]

On the other hand, an abuse of discretion was found in *People v. Agar*.[22] The defendant was charged with distributing child sexually abusive material, and using a computer to commit a crime. A prosecution expert in computer forensics testified about software that he used to find defendant's IP address and the Shareaza software he believed defendant used to possess and share child pornography. Defendant's theory was that he inadvertently downloaded and shared child pornography, and defense counsel confessed to a lack of sophistication regarding computer issues in general, and so needed an expert to examine defendant's computer, to prepare for trial, and to effectively rebut the testimony offered by the prosecution's expert. The trial court found there was not sufficient need shown for an expert. The Court of Appeals found an abuse of discretion because, in large part, it found that

> there [were] indications in the instant case that call into question the results obtained by the prosecution's expert. It is noteworthy

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[21] *Id*., at 617-619. See also *People v. McDonald*, 303 Mich. App. 424 (2013).

[22] *People v. Agar*, 314 Mich. App. 636 (2016), rev'd in part, and remanded, 500 Mich. 891 (2016).

> that a majority of Detective Stevens's evidence was retrieved from what he called unallocated space or a place where the item's contents had been deleted but the name of the item still existed. While the actual video file was not retrievable, the jury was to infer that a file name was representative of the contents of the video. Detective Stevens's search of defendant's desktop hard drive produced deleted child pornographic thumbnail images and remnants of the names of deleted files. The thumbnails represented both boys and girls, and Detective Stevens found that unusual, alluding that he would expect to find a user's preference to be one or the other. The prosecution's theory was that defendant downloaded the images and deleted them after viewing them. However, Detective Stevens could not testify based on his examination when the items were downloaded. In regards to some items, the entire file path to an exhibit was not displayed, which could have shown where an item originated. The detective also acknowledged that certain software was required to view AVI, MPG, and MP4 files1 and that he did not know whether defendant's computer possessed the software.[23]

This Court, however, while upholding the finding of an abuse of discretion, vacated the grant of a new trial and remanded for a hearing in the trial court after appointment of a defense expert, for without some findings by a defense expert contrary to the prosecution's expert, no prejudice could be shown.[24]

Here, the trial judge did not abuse his discretion because, as has been argued, that discretion was not invoked for the appointment of a DNA expert, but for co-counsel, which the trial court was without authority to appoint. And defense counsel supported his request for a DNA-litigation specialist to assist him only by saying that "this is a case of scientific and complex nature." *Even if* counsel *had* requested appointment of a scientific expert, this scarcely

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[23] *Id*., at 644-645.

[24] *People v. Agar*, 500 Mich. 891 ("the error in denying funds may not have prejudiced the defendant, and, at this point in the proceedings, it would be premature to vacate the defendant's convictions before the results of independent forensic analysis are known").

meets the statutory threshold, as explained in *Tanner*. And as will be seen, defense counsel's performance belies any claim that an expert was necessary.

The statutory standard is consistent with the due process requirements laid out in *Ake* and the most recent case from the Supreme Court of *McWilliams v. Dunn*. But first, this Court noted, in its order specifying the question to be briefed, the case of "*Moore v State*, 390 Md 343, 364 (2005) ("The majority of courts have concluded that *Ake* extends beyond psychiatric experts.").[25] The People do not contest that point, but believe it unnecessary for decision here. In *Caldwell v. Mississippi*[26] the defendant's request for appointment of a fingerprint expert and a ballistics expert was denied. The State Supreme Court affirmed on the ground that defendant offered nothing more than undeveloped assertions that the experts would be beneficial, and on that ground the Supreme Court found no deprivation of due process.[27] *Caldwell* has been understood to suggest but not decide that *Ake* extends to nonpsychiatric experts, given its conclusion that Caldwell had not established an *Ake* threshold for the appointment.[28] Here, the defendant

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[25] See also *State v. Wang*, 92 A.3d 220, 230 (Conn., 2014) ("we agree that the right articulated in Ake is not contingent upon the penalty sought or the field of assistance demanded, so long as that assistance is reasonably necessary for the indigent defendant to have 'a fair opportunity to present his defense"). And see fn 15 (collecting cases).

[26] *Caldwell v. Mississippi*, 472 U.S. 320, 323, 105 S. Ct. 2633, 2637, 86 L. Ed. 2d 231 (1985).

[27] *Id*., 105 S.Ct. At 2637.

[28] See *Moore v. Kemp*, 809 F.2d 702, 711 (CA 11 en banc, 1987) ("The Supreme Court's statement in *Caldwell* implies that the government's refusal to provide nonpsychiatric expert assistance could, in a given case, deny a defendant a fair trial. The implication is questionable, however, in light of the Court's subsequent statement that it had 'no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type [Caldwell] sought'"). See also 3 LaFave, Israel, King, & Kerr, *Criminal Procedure* (4th Ed), § 11.2(e).

requested co-counsel, not a scientific expert, and, as in *Caldwell*, the request was inadequate even if viewed as a request for a scientific expert.

The *Tanner* standard is consistent with due process. In *Ake* the defense was insanity. Counsel asked the court either to arrange to have a psychiatrist perform the examination, or to provide funds to allow the defense to arrange one, and his motion was denied. The defense was thus left to presentation of the insanity defense with no expert whatever. The Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one."[29] Due process so requires because "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense," as "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."[30] Similarly, in the recent *McWilliams* case the Court applied *Ake* and found error, for though, in a death-penalty sentencing hearing, a psychiatrist was appointed who prepared a report, that psychiatrist was not available to defense counsel. The Court said that

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[29] *Ake,* 105 S. Ct. at 1091–1092.

[30] *Id*., at 1095.

> *Ake* does not require just an examination. Rather, it requires the State to provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." . . . But what about the other three parts? Neither Dr. Goff nor any other expert helped the defense evaluate Goff's report or McWilliams' extensive medical records and translate these data into a legal strategy. Neither Dr. Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness (as an expert later testified in postconviction proceedings, see P.C.T. 936–943). Neither Dr. Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself.[31]

Because defendant had made the relevant "threshold showing," he was entitled to the assistance of a medical expert as laid out by *Ake*.[32] Not so here. Again, defendant requested the appointment of co-counsel, not a scientist expert, and his request was inadequate both under the statute and due process,[33] even if viewed as a request for appointment of a scientist expert.

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[31] *McWilliams v. Dunn*, 137 S. Ct. at 1800–1801.

[32] "[N]o one denies that the conditions that trigger application of *Ake* are present. McWilliams is and was an 'indigent defendant'. . . . His 'mental condition' was "relevant to ... the punishment he might suffer' . . . . And, that 'mental condition,' i.e., his 'sanity at the time of the offense,' was 'seriously in question' . . . . Consequently, the Constitution, as interpreted in *Ake*, required the State to provide McWilliams with 'access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.'" *Id*., 137 S. Ct. at 1798.

[33] In *Moore v. Kemp*, supra, the court said that the inquiry is *"the reasonableness of the trial judge's action at the time he took it.* This assessment necessarily turns on the sufficiency of the petitioner's explanation as to why he needed an expert. That is, having heard petitioner's explanation, should the trial judge have concluded that unless he granted his request petitioner would likely be denied an adequate opportunity fairly to confront the State's case and to present his defense," and concluded that there was no error where the defense motion "failed to create a reasonable probability that expert assistance was necessary to the defense and that without such assistance petitioner's trial would be rendered unfair." *Moore v. Kemp*, at 712, 717-718 (emphasis supplied).

2. Counsel was not ineffective

Though scientific evidence can be daunting, it was relatively straightforward in the present case. Amy Altesleben, a forensic scientist with the Michigan State Police crime lab, with a bachelor's degree in biological sciences, and a master's degree in molecular science, who had performed DNA analysis over 300 times, and testified previously as an expert,[34] testified regarding a DNA match with defendant. When she was offered as an expert, defense counsel engaged in voir dire concerning proficiency testing conducted at the lab, demonstrating an understanding of procedure.[35] Ms. Altesleben testified concerning a "CODIS hit"; that is, the lab received a DNA profile, and it was run against the existing database system of DNA profiles and a match to defendant was obtained. Defendant's DNA was confirmed to be present on rectal and vaginal swabs of the victim with testing from a fresh buccal swab from defendant.[36] Altesleben testified that with respect to the vaginal swab the statistical match was "in the Caucasian population you would expect to see those DNA types in 1 in 11.65 trillion individuals," and "in the African American population 1 in 12.77 trillion individuals," and in the Hispanic population 1 in 18.86 trillion." With respect to the rectal swab, the statistical match was "the Caucasian population you would expect to see the DNA types in the major donor 1 in 13.9 quadrillion and in the African American population 1 in 15 4.093 quadrillion, and "in the Hispanic population 1 in 42.23 17 quadrillion."[37]

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[34] T 7-15, 6-8.

[35] T 7-15, 9-13.

[36] T 7-15, 14-35.

[37] T 7-15, 36.

With regard to fingernail samples of the victim tested, Altesleben could say only that from her testing on the left fingernail defendant could not be excluded as a donor to the DNA types obtained, and as to the right fingernail she could express no conclusion.[38] But she also indicated that the samples were suitable for further testing, YSTR testing, which was done by another analyst.[39]

Defendant's cross-examination reveals no lack of understanding of the principles involved in the analysis done by Ms. Altesleben. He pressed her on the fact that the referral of the fingernails was requested specifically by the prosecuting attorney.[40] He questioned her about the storage of the samples, the reagent used to break down the cells to extract the DNA, and the handling of the samples.[41] He questioned her about the reading of electropherograms, and whether there could be different opinions in those readings among analysts, and what happens if there is.[42] His questioning demonstrated an understanding of the testing and procedures done.

A second expert from the State Police lab, Andrea Halvorsen, testified as to the additional testing done on the fingernails. She testified to having a bachelors degree in biology, and a masters in forensic science, with a concentration on forensic biology.[43] She explained YSTR testing, and said that as to the left fingernail, the testing revealing the presence of at least three

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[38] T 7-15, 41-45.

[39] T 7-15, 45.

[40] T 7-15, 51-53.

[41] T 7-15, 53-62.

[42] T 7-15, 65-67.

[43] T 7-15, 74.

male donors, and defendant was the major donor.[44] On cross-examination defense counsel again demonstrated an appropriate knowledge of the science, and brought out that when the prosecutor "asked you could it be true that he was . . . a quote unquote major contributor she could have been the last contributor . . . You said well, it could be? . . . . And it also could not be, correct?" to which Halvorsen answered "true," and further testified in response to cross-examination that "I can't say if he was the last contributor, no not at all."[45]

On this record, it cannot be said that counsel was ineffective for not requesting appointment of a scientific expert, and establishing an appropriate threshold of need for the appointment. Neither deficient performance nor prejudice can be shown. There is a strong presumption that counsel provided effective representation.[46] Defendant must prove that counsel made such grave mistakes that he or she was not acting as the counsel envisioned by the Sixth Amendment, and that the defendant was been prejudiced by the deficient performance.[47] To show prejudice, defendant must prove that counsel's errors were so serious that they deprived him of a fair trial, a trial whose result is reliable.[48] Whether viewed as a request for co-counsel, properly denied, with no request for appointment of a science expert, or a request for the appointment of an "expert" that was inadequately supported to justify that appointment, defendant has not shown deficient performance. Nothing suggests that defense counsel was not

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[44] T 7-15, 80-81.

[45] T 7-15, 94-95.

[46] *Strickland v Washington*, supra

[47] *Id.*

[48] *Id.*

adequate to the task of understanding the DNA evidence, nor has a showing been made that this evidence was somehow suspect, or that defense counsel *could* have established the threshold for appointment of a science expert. Again, defense counsel's performance at trial was more than adequate. This is further evidenced by the defense. Defendant testified. It was his testimony that at the time of the murders he was down in the area, the Cass Corridor, on a regular basis, often engaging the service of prostitutes, which was his "thing at the time."[49] He could not say whether or not he had met the victim, or had sex with her, as he could not recall, but testified that as to the prostitutes he had hired he had not assaulted nor murdered them,[50] so that even if he had previous contact with the victim, and had sex with her, his defense was that this did not prove that he killed her, and he said he had not. On the record of counsel's performance and the defense raised, no prejudice can be shown here, even if counsel's performance was deficient, which it was not.

Conclusion

No error occurred here, because defense counsel requested co-counsel be appointed, and that request was properly denied. Counsel was not ineffective in not requesting a science expert, as the record shows that he well understood the DNA evidence being offered, and there is no suggestion of any way that evidence could be challenged. Even if counsel's performance be viewed as somehow deficient, and the judge's ruling an abuse of discretion, there is no prejudice here.[51] Leave should be denied.

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[49] T 7-15, 108.

[50] T 7-15, 108-110, 118.

[51] See *People v. Agar*, supra.

Relief

Wherefore, the People request that leave to appeal be denied, or the Court of Appeals affirmed.

Respectfully submitted,

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